No. 93-1250

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In The

Supreme Court of the United States

October Term, 1993

LYLE S. CHANDLER, ADOLPHUS A. MADDOX, and OTHERS SIMILARLY SITUATED,

Petitioners,

vs.

THE CITY OF DALLAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals has applied this Court's standard on whether an individual is handicapped?

2. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals, after reviewing the evidence by the district court, has applied this Court's standard and found that the petitioners, as a matter of law, were not otherwise qualified?

3. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals has determined that individualized inquiries are needed in order to determine if someone is handicapped or otherwise qualified under the Rehabilitation Act?

4. Did the Fifth Circuit Court of Appeals violate the clearly erroneous rule by setting aside the district court's erroneous view of the law?

5. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals has applied this Court's standard that due process requires only a hearing by an impartial trier of fact?

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No. 93-1250

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THE CITY OF DALLAS,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

The City of Dallas ("City") files this Brief in Opposition to this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Response"), asking this Court to deny the Petition for Writ of Certiorari ("Petition") to review the opinion issued September 20, 1993 by the United States Court of Appeals for the Fifth Circuit. In support of this request, the City respectfully shows the Court as follows:

JURISDICTION

The Court's jurisdiction of this appeal is based on the judgment and opinion of the Fifth Circuit Court of Appeals entered on September 20, 1993. The Petitioners' petition for panel rehearing and suggestion for rehearing en banc were denied by the Fifth Circuit on November 2, 1993. This court has jurisdiction to review the judgment of the Fifth Circuit under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION

Petitioners' course of proceedings and disposition is essentially correct, but incomplete. Notably absent is a detailed description of the specific holdings of the Fifth Circuit Court of Appeals, and Respondent respectfully urges this Court to review these holdings with Petitioner's statements.

The Fifth Circuit held that Adolphus Maddox ("Maddox") was neither handicapped, regarded as handicapped by the City, or otherwise qualified for his position. The circuit court also specifically held that Lyle Chandler ("Chandler") had failed to prove he was neither handicapped, regarded as handicapped by the City, nor otherwise qualified under the Rehabilitation Act, ("Act"), 29 U.S.C. §701 *et seq.*

The Fifth Circuit held that neither Maddox nor Chandler was handicapped simply because they could

not meet one requirement of a particular job, and therefore an impairment that affects only a narrow range of jobs does not substantially limit a person's major life activities. The appeals court also held that both Chandler and Maddox appear to have been capable of safely performing all duties of their respective positions except driving.[1] Simply stated, Chandler and Maddox failed to adduce sufficient evidence to support a finding of law that the City regarded them as handicapped.

The appeals court also concluded that as a matter of law, a driver with insulin-dependent diabetes or with vision that is impaired to the extent discussed in 49 C.F.R. §391.41 presents a genuine substantial risk that he or she could be injured or could injure others.[2] The Fifth Circuit held that the district court clearly erred as a matter of law by holding that petitioners were otherwise qualified for primary driver positions.

The Fifth Circuit found that the district court improperly certified two subclasses of plaintiffs under the Rehabilitation Act because individual determinations need to be made in order to determine if someone is handicapped or otherwise qualified.

The Fifth Circuit concluded as a matter of law that petitioners failed to establish any causal nexus between protected free speech and any injury they may have incurred. Furthermore, the court concluded that the City did have a rational basis for adopting and maintaining its Driver Safety Program ("Program") and its classification

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[1] *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993).

[2] *Id.* at 1395.

of Chandler and Maddox. The court also held that the demotion hearing afforded to Chandler met all constitutional requirements.[3]

Petitioners have not appealed the Fifth Circuit's ruling that they failed to prove a violation under the Texas Commission on Human Rights.[4]

B. STATEMENT OF FACTS

In 1978, the City adopted a Driver Safety Program (Administrative Directive 3-3) ("AD 3-3") to reduce the risk of loss to the City, its employees, and the public resulting from vehicular collisions involving City employees. AD 3-3 established certain physical standards for City employees who drive on public roads as an intrinsic part of their job duties. Employees of this type are referred to as primary drivers. The physical standards required by AD 3-3 were patterned on safety regulations promulgated by the United States Department of Transportation. If an employee did not meet these standards, he could not be certified as a primary driver and thus was ineligible for primary driver positions.[5]

Two of the medical standards for primary drivers are of particular importance to this petition. A primary driver: (1) cannot have an established medical history of

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[3] *Id.* at 1396-1397.

[4] Tex. Rev. Civ. Stat. Ann. art. 5221K (1987).

[5] No waiver was available for failure to meet a physical standard when AD 3-3 was initially adopted. Waivers, at the time of trial, were allowed for all physical standards except the vision standard and drug or alcohol abuse.

diabetes mellitus severe enough to require insulin for control; and (2) must have 20/40 vision (corrected) and a field of vision of at least 70 degrees in the horizontal meridian in each eye.

Chandler has diabetes mellitus that requires insulin for control. Maddox has impaired vision in his left eye that cannot be corrected to meet the minimum standards of AD 3-3. Both of these petitioners held jobs with the City that were classified as primary driver positions.[6]

Chandler has required insulin for control of his diabetes since 1977 and has been an employee of the City of Dallas since 1981. In 1985, Chandler failed his initial driver's physical because of his diabetes. At that time he was employed as an Electrical Repairer T-9, a primary driver position. Chandler was allowed to retain that position on the condition that he be driven by another coworker when he had to go to another work site.

Chandler has had at least two major on-the-job hypoglycemic episodes in which he was completely unable to function due to his diabetic/insulin condition and emergency medical treatment was required. He also admits that he has had numerous other minor hypoglycemic

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[6] The positions held by Chandler and Maddox were subsequently reclassified as non-primary driver jobs. The petitioners have never alleged any impropriety in either the original classification or in the later reclassification, nor have they contested the City's assertion that these positions were reclassified because the amount of driving associated with both positions had decreased. Additionally, in January 1990, Chandler subsequently applied for and received a physical waiver allowing him to apply for primary driver positions.

incidents, during which he was confused and addled. Chandler has also had a series of safety and misconduct incidents on the job. In 1986, he caused a serious electrical accident that resulted in injuries to himself and two co-workers. That same year, after a subsequent safety violation and violation of City personnel rules, Chandler was demoted to Electrical Repairer T-7.

Maddox was hired by the City in 1982 and was promoted to Plant Mechanic T-7 in 1983. Maddox failed his initial driver's physical in 1985 because of poor vision in his left eye. Among other problems, his vision in his left eye cannot be corrected to better than 20/60 and his horizontal field of vision in that eye is less than 70 degrees. As with Chandler, Maddox was allowed to retain his then current position (which was also classified as a primary driver position) on the condition that a co-worker drive him when he needed to work at other facilities.

Chandler and Maddox were able to apply for promotion to all positions in the City which were not primary driver positions for which they met the minimum requirements.[7] In December 1985, Chandler and Maddox

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[7] Petitioners claim that class members have been barred from four thousand (4,000) City jobs because of their impairments. No evidence exists that petitioners were prevented from applying for that many positions. The "4,000" number was derived from a misreading of the testimony. If the Court were to accept the petitioners' analysis on 4,000 primary driver positions, the fact that in 1985 the City had 13,500 total positions, petitioners would then have been eligible for over 9,500 jobs that were not classified as primary driver positions. Moreover, no evidence was presented regarding petitioners' qualifications for those "4,000" jobs. Some of these jobs would be lower posi-

filed suit against the City, alleging that the Program discriminated against them in violation of the Rehabilitation Act, 29 U.S.C. §§701-796, the First and Fourteenth Amendment of the U.S. Constitution, and 42 U.S.C. §1983. The complaint was subsequently amended to include claims under the Revenue Sharing Act, 31 U.S.C. §6701, and the Texas Commission on Human Rights Act, Tex. Rev. Civ. Stat. Ann. art. 5221K.

The district court certified two classes of plaintiffs (those with substandard vision and those with insulin-dependent diabetes) for purposes of injunctive relief. After a bench trial, the court rendered judgment for the plaintiffs, but failed to make findings of fact and conclusions of law. The City appealed, and the Fifth Circuit vacated the judgment and remanded the case "for detailed findings of fact and concomitant conclusions of law."[8] On remand, the district court reinstated its judgment and made findings of fact and conclusions of law. The City again appealed, and the Fifth Circuit reversed and rendered on all counts on September 20, 1993.[9]

SUMMARY OF ARGUMENT

The Fifth Circuit's application of the Rehabilitation Act to the present case does not warrant review by this

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tions than those held by petitioners, and some would be promotions for which petitioners would not be qualified for, regardless of the driving classification.

[8] *Chandler v. City of Dallas*, 958 F.2d 85, 90-91 (5th Cir. 1992).

[9] *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993).

Court because the decision correctly applies this Court's precedent and applicable law, and there is no conflict among the circuits.

The City adopted AD 3-3 in 1978. This directive disqualifies City employees with specified psychiatric and physical conditions from operating City vehicles as a primary duty of their employment. Contrary to the claims of petitioners, and the class members they represent, AD 3-3 does not discriminate against the handicapped in violation of the Rehabilitation Act, 29 U.S.C. §701 *et seq.*, 42 U.S.C. §1983 and the First and Fourteenth Amendments of the United States Constitution.

The Fifth Circuit applied the proper standard by finding that as a matter of law, neither Chandler nor Maddox was either "handicapped" or "otherwise qualified." The appeals court did find that both petitioners had physical ailments, however, neither provided any evidence that he was unable to perform any of life's major life activities. Moreover, the Fifth Circuit ruled that petitioners provided no evidence that the City regarded them as handicapped. Chandler and Maddox were accommodated and retained in their positions. The only inconvenience that petitioners endured was a temporary restriction from applying for certain positions. This limited restriction is not "substantially limiting" for the purpose of the Act.

The Fifth Circuit was also correct in holding that Chandler and Maddox were not "otherwise qualified" because of the safety risks they posed in the positions they occupied. Petitioners failed to provide any evidence

that a reasonable accommodation existed to eliminate or reduce the substantial risk inherent in driving.

The court of appeals held that class certification was inappropriate in this case because an individualized determination had to be completed in order to determine if the proposed class members were either handicapped and otherwise qualified as required by this Court's precedent. The Fifth Circuit's holding was correct in finding that Chandler's due process rights were not violated because the demotion hearing he received was constitutionally adequate.

The Fifth Circuit's decision was not bound by the clearly erroneous standard of Fed. R. Civ. P. 52(a) because this rule only applies to findings of fact. This rule does not apply to conclusions of law. The court of appeals set aside the district court's conclusions of law because they were based on erroneous views of the law. The holding is consistent with this Court's previous decisions.

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

I. INDIVIDUALS WITH HANDICAPS

A. DEFINING HANDICAP

The Fifth Circuit's application of the Act, 29 U.S.C. §§701-796i, to the present case does not warrant review by this Court. The decision does not conflict with any other circuit court opinion. Furthermore, the court of appeals applied this Court's holding in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

Petitioners have sought to prove a violation of §504 of the Act, which provides in pertinent part that "no otherwise qualified handicapped individual," as defined in [29 U.S.C. §706(8)], shall solely by reason of his handicap be excluded from participation in any program receiving federal financial assistance.[10] The Act defines an individual with handicaps for employment purposes as a person "who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 29 U.S.C. §706(8)(B).

An individual seeking recovery under the Act must at minimum, establish each of the following four elements:

(1) that he was an individual with a handicap;

(2) that he was "otherwise qualified" for the position;

(3) that he was adversely treated "solely by reason" of his handicap; and

(4) the treatment occurred under a program or activity receiving federal financial assistance.[11]

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[10] The Act has been amended since this suit was filed in order to incorporate the language and standards of the Americans with Disabilities Act (ADA). 42 U.S.C. §12101 *et seq.* Among the changes was the substitution of the term "disability" for the term "handicap." Both terms are used in this Response.

[11] *School Board of Nassau County v. Arline*, 480 U.S. 273, 277 (1987); *Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991).

The Fifth Circuit found, as a matter of law, that petitioners were neither "handicapped" nor "otherwise qualified" as defined by the Act. The court of appeals did not rule on elements three and four. *Chandler*, 2 F.3d at 1396.

Petitioners claim they are handicapped because they have physical impairments which limit a major life activity, their ability to work, and that the City regarded them as handicapped by not allowing them to promote into "primary driver" positions. The court of appeals found both of these contentions to be without merit.

The Supreme Court has used the Department of Health and Human Services (DHHS) regulations to help interact what is meant by "physical impairments" and "major life activities." *Arline*, 480 U.S. at 280. Those regulations define a physical impairment as "[A]ny physiological disorder or condition, cosmetic disfiguration, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal, special sense organs; respiratory, including speech organs, cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine."[12] "Major life activities" are defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[13]

Chandler and Maddox have physical ailments, but that alone does not rise to the level of being handicapped under the law. The real issues are: do their physical ailments equate to the legal definition of a "handicap,"

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[12] 45 C.F.R. §84.3(j)(2)(i) (1992).

[13] 45 C.F.R. §84.3(j)(2)(ii) (1992).

and if so, do these handicaps limit their abilities to accomplish any of major life activities? The Fifth Circuit, as a matter of law, accepted Maddox's testimony as true and held that he was not handicapped because his vision, which could be corrected to 20/60, did not limit him from any of major life activities.[14] The Fifth Circuit had previously held that a person is not per se handicapped if his vision can be corrected to only 20/200.[15] The appeals court also found that Chandler failed to show that he was unable to perform a major life activity. Equally important was Chandler's testimony that he did not consider his diabetes to be a substantial limitation on his major life activities.[16] The court found that as a matter of law, Chandler and Maddox had failed to show they were handicapped under the first prong of the statutory definition of an individual with a handicap.[17]

The American Diabetes Association ("Association") in its Amicus Brief argues that Chandler, simply having diabetes automatically classifies him as handicapped under the Act. They cite no legal precedent to support this finding. According to the Association, the only issue is whether the person is suffering from a physical ailment. The Association fails to complete the legal analysis required by the Act and the ADA.[18]

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[14] Class Certification Transcript Vol. 15, pp. 51-52.

[15] *Collier v. City of Dallas*, No. 86-1010 (5th Cir. August 19, 1986) (unpublished).

[16] Transcript Vol. 18, pp. 41-42.

[17] *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (1993).

[18] Petitioners and the American Diabetes Association strenuously argue that the Fifth Circuit's decision will have an

The EEOC's ADA Interpretive Guidelines on Title I state that the existence of an *impairment* is to be determined without regard to mitigating measures such as medicines. *See* 29 C.F.R. §1630.2(h) (1993) (emphasis added). A physical impairment does not equal a handicap as the Association would tend this Court to believe. The EEOC stressed in its regulations that the determination of whether a physical impairment existed was only the initial step in making a determination of disability. "An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities."[19] The Association does not complete the legal analysis because they are unable to show how Chandler was substantially limited from a major life activity.

Petitioners argue that the diabetes and visual problems of Chandler and Maddox are serious because they are permanent and both have had these impairments for decades, and therefore, they are per se handicapped. The problem with petitioners' analysis is that they too fail to complete the legal analysis required both under the Act and the ADA. The Act and the ADA do not attempt to create a "laundry list" of impairments that are disabilities as the petitioners seem to argue. The EEOC regulations to the ADA specifically state:

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adverse effect on the ADA. This case was filed in 1985 and not under the laws or regulations of the ADA. The ADA regulations, however, are helpful in interpreting the terms and meaning of the Act.

[19] 29 C.F.R. §1630.2(j) (1993). *See also* 29 U.S.C. §706(8)(B)(i) (1993).

> "The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but nor for others, . . . "[20]

The Equal Employment Opportunity Commission (EEOC) has stated that a determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis. An individual is not substantially limited in a major life activity, if the limitation does not amount to a significant restriction when compared to the abilities of the average person.[21] Thus, an individual is not substantially limited in working merely because he is unable to perform a particular job, aspect of the job, or narrow range of jobs.[22]

The Association cites several cases which it claims holds that certain physical impairments are per se handicaps regardless of mitigating measures. They cite these examples to argue that individuals suffering from diabetes should therefore be classified as handicapped. The Association, however, fails to include that *Gilbert v. Frank*[23]

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[20] 29 C.F.R. §1630.2(j).

[21] *Id.*

[22] *See, Elstner v. Southwestern Bell Telephone Co.*, 659 F.Supp. 1328 (S.D. Tex. 1987), *aff'd*, 863 F.2d 881 (5th Cir. 1988); *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); *Jasany v. U.S. Postal Service*, 755 F.2d 1244 (6th Cir. 1985).

[23] 949 F.2d 637 (2nd Cir. 1991), (Plaintiff with kidney cysts was handicapped because his physical impairment was the reason he was ***denied employment*** with the Defendant).

and *Reynolds v. Brock*,[24] also found that the individuals suffering from their physical ailments were also substantially limited from working when they were either denied employment or terminated because of their physical ailments. These cases are not in conflict with the Fifth Circuit's holding and do not present a conflict among the circuits.

The Fifth Circuit simply concluded that although Chandler and Maddox had physical impairments, neither was handicapped as a matter of law because neither individual was substantially limited from performing a major life activity.

B. REGARDED AS HANDICAPPED

Petitioners argue in the alternative that they are handicapped because the City regarded them as having a disability that substantially limited a major life activity.[25] Simply restated, since the City would not promote Chandler and Maddox into primary driver positions, they believe that this alone is sufficient to meet the requirements of the Act.

The Fifth Circuit ruled that the district court erred as a matter of law by accepting the petitioners' contentions, equating the partial, temporary restrictions on their driving privileges as the City "regarding" them as unable to

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[24] 815 F.2d 571 (9th Cir. 1987), (Plaintiff, whose medication at times controlled her epileptic seizures, was handicapped because her physical impairment was the reason she was ***terminated*** by the Defendant).

[25] 29 U.S.C. §706(8)(B)(iii) (1993).

perform the major life function of working. The court of appeals emphasized that several circuit courts have addressed the issue of how limiting an employer must consider an employee's impairment to be before the employer is held to regard the employee as handicapped.[26] The courts that have ruled on this issue have consistently held that an impairment that interferes with an individual's ability to do a particular job, but does not significantly decrease the individual's ability to obtain satisfactory employment otherwise is not "substantially limiting" for the purpose of the Act.[27] That the City retained Chandler and Maddox on its work force and accommodated their partial, temporary loss of driving privileges conclusively establishes that it did not regard them as unable to work.

The City was aware of Chandler's diabetes and Maddox's visual problems when they applied for work, and the City hired them without regard to their medical conditions. When their jobs were classified as primary driver positions, the City did not terminate or demote them.[28]

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[26] *Chandler*, 2 F.3d at 1391-1392.

[27] *Forrisi v. Bowen*, 794 F.2d 934 (4th Cir. 1986); *Elstner v. Southwestern Bell Telephone Co.*, 659 F.Supp. 1328 (S.D. Tex. 1987), *aff'd*, 863 F.2d 881 (5th Cir. 1988); *Jasany v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *Daley v. Koch*, 892 F.2d 212 (2nd Cir. 1989); *Welsh v. City of Tulsa*, 977 F.2d 1415 (10th Cir. 1992); *de la Torres v. Bolger*, 610 F.Supp. 593 (N.D. Tex. 1985), *aff'd*, 781 F.2d 1134 (5th Cir. 1986); *Tudyman v. United Airlines*, 608 F.Supp. 739 (C.D. Cal. 1984).

[28] Other Circuit courts have found employees who were terminated or demoted because of physical ailments not to be regarded as handicapped. *Forrisi v. Bowen*, 794 F.2d 93i, 934 (4th Cir. 1986), (employee terminated for his impairment (acro-

Instead, both employees were retained in their positions and accommodated by allowing other individuals to do the driving for them. The petitioners were simply not allowed to apply for primary driver positions, they were allowed however, to apply for any other position that was not a primary driver position. No evidence exists that petitioners were barred from applying for "thousands" of positions. As a result of these uncontested facts, the Fifth Circuit held as a matter of law that petitioners were not regarded as handicapped by the City.

II. OTHERWISE QUALIFIED

For the sake of argument, if petitioners are deemed to be handicapped, they have failed to show that they were "otherwise qualified" for the positions desired. The Fifth Circuit, in applying this Court's standard of *School Board of Nassau County v. Arline*[29] found that petitioners failed to show they were otherwise qualified.

An "otherwise qualified" individual must be able to perform the "essential functions" of his job. In *Chiari*, the

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phobia), but the court found his impairment was not a substantial limitation in his employability); *Elstner v. Southwestern Bell Telephone Co.*, 659 F.Supp. 1328, 1343 (S.D. Tex. 1987), *aff'd*, 862 F.2d 881 (5th Cir. 1988) (employee's injured knees prevented him from performing an intrinsic part of his job, employee demoted, court found that restrictions did not constitute a substantial limitation on his ability to work since the company retained him).

[29] 480 U.S. 273 (1987). *See also Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). This Court defined an otherwise qualified person as one who is able to meet all of a program's requirements in spite of his handicap.

Fifth Circuit said "courts which have applied §504 unanimously have held that a handicapped individual cannot perform the essential functions of a job if his handicap poses a significant safety risk to those around him".[30] It must also be determined if a reasonable accommodation by the employer would enable the employee to perform those functions.

An employer is allowed to consider potential safety risks as well as seriousness of the potential harm when making a decision about employment criteria.[31] The Fifth Circuit stated that a two party inquiry is required in order to determine whether an individual is otherwise qualified. First, can the individuals perform the essential functions of the job, and secondly, if the individual is not able to perform the essential functions, is there a reasonable accommodation the City can provide which would enable the employer to perform those functions?[32]

Petitioners have never contested the City's assertion that driving is an essential function of every primary driver position.[33] The Fifth Circuit found this to be a fatal

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[30] *Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991).

[31] 29 C.F.R. 1630.2(i) (1993). *See, Doe v. New York Univ.*, 666 F.2d 761 (2nd Cir. 1981).

[32] *Chandler*, 2 F.3d at 1393; *Chiari*, 920 F.2d at 317.

[33] Primary Drivers are those City employees who are certified to operate a motor vehicle on public thoroughfares for the City as an *intrinsic* part of their job duties. Secondary Drivers are those City employees who are certified to operate a motor vehicle on public thoroughfares for the City as an *adjunct* duty to their job. Tertiary Drivers are those City drivers who operate motor vehicles and automotive equipment on City property

legal flaw in petitioners' argument because, in taking this approach, petitioners failed to produce sufficient evidence that would support a finding that they were otherwise qualified for primary driver positions.[34]

The petitioners and the Association argue that the Fifth Circuit's decision will automatically exclude all insulin-dependent diabetics from jobs requiring any driving. This argument is totally without foundation because the court of appeals clearly stated that the physical impairments of AD 3-3 only prevented an individual from holding a position where driving was an intrinsic function of that job. The record shows that for a short period of time that Chandler was prevented from promoting into these positions, but at the same time he could seek promotion to any other position where driving was not an intrinsic function of the job.

The Fifth Circuit did hold that as a matter of law, a primary driver with insulin-dependent diabetes or with vision that is impaired to the extent discussed in 49 C.F.R. §391.41[35] presented a genuine substantial risk that the driver could injure himself or others, and therefore, is not

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where public access is limited. Only Primary Drivers are subject to the physical standards of the Program. AD 3-3.

[34] *Chandler*, 2 F.3d at 1394.

[35] Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, filed of vision of at least 70 degrees in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green and amber.

otherwise qualified.[36] The circuit court, however, did leave open the possibility that the court's holding would be modified when medical science advances to the stage where it can be determined that individuals with these impairments no longer present a substantial risk.[37] But, as Chandler's two severe hypoglycemic reactions and numerous other minor hypoglycemic incidents while employed with the City amply demonstrate, it has not yet reached that point.[38] This Court has held that a risk of one in a thousand may well be a significant one.[39] The City was not required to provide any evidence that Chandler and Maddox ever had on-the-job accidents, nor was the City required to provide statistical evidence

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[36] *Chandler*, 2 F.3d at 1395.

[37] *Id.* Footnote 52. "We nonetheless share the hope . . . that medical science will soon progress to the point that exclusions on a case by case basis will be the only permissible procedure; or, hopefully, methods of control may become so exact that insulin-dependent diabetics will present no risk of ever having a severe hypoglycemic episode." *Davis v. Meese*, 692 F.Supp. 505, 521 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3rd Cir. 1989).

[38] Federal courts have uniformly held that insulin-dependent diabetics are not otherwise qualified for positions involving driving or other high risk activities. *Davis v. Meese*, 692 F.Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3rd Cir. 1989) (exclusion of all insulin-dependent diabetics from FBI upheld); *Serrapica v. New York*, 708 F.Supp. 64 (S.D. N.Y. 1989) (diabetic sanitation truck driver held not "otherwise qualified"). *See also* 14 C.F.R. §§67.13(f)(1), 67.17(f)(1), 67.65(f)(1) (1984) (insulin-dependent diabetics may not receive pilots license).

[39] *Industrial Union Dept. v. American Petroleum Institute*, 448 U.S. 607, 655 (1980) (Stevens, J., plurality opinion).

posed by an insulin-dependent diabetic or an individual with impaired vision in the work place.[40]

Petitioners and the Association argue in their petitions that the Fifth Circuit's decision is legally flawed because it fails to do an individual analysis on whether Chandler and Maddox were "otherwise qualified." A close reading of the Fifth Circuit's opinion shows that an individualized inquiry was conducted. The court found that where driving was an intrinsic part of the position, which in this case it was, an individual with insulin-dependent diabetes or with Maddox's impaired vision, was not otherwise qualified.[41] Petitioners and the Association argue that if an individualized inquiry had been conducted, it would have shown that Chandler and Maddox were able to safely drive for the City. This argument is totally contrary to their initial position that both individuals suffered from permanent physical impairments that prevented them from performing some of life's major activities. The Association even acknowledges in its argument, that while at work Chandler experienced diabetic reactions requiring hospitalization when his disease was out of control.[42] Had these reactions occurred while Chandler was driving a City vehicle, results could have been catastrophic; he could have fatally injured himself or someone else.

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[40] *Chiari*, 920 F.2d at 313.

[41] *Chandler*, 2 F.3d at 1395.

[42] See Association's Petition, p. 11, fn. No. 3.

If this Court were to hold otherwise, it would send a message to every employer, that even though an individual with a physical impairment presents a genuine risk that he will harm himself or others, an employer must place them in that position until they actually cause an accident. This would do nothing but put all employers in the defensive position of explaining why they placed an individual who was known to be a substantial risk, in such a position.[43]

The Association correctly points out that the Federal Highway Administration has amended the federal licensing regulation which prevented insulin-dependent diabetics from obtaining interstate commercial driver licenses. The regulations now allow for insulin-dependent diabetics to obtain waivers. This amendment occurred on July 29, 1993. *See*, 58 Fed. Reg. 40690 (July 29, 1993).[44] The City has taken this individualized approach for years because it has allowed for these waivers since October 1, 1989,[45] and Chandler received his waiver in January, 1990.[46] This is a clear indication that the City has been concerned about the rights of those who are physically impaired several years before the passage of the ADA.

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[43] As the Fifth Circuit aptly stated, "Woe unto the employer who put such an employee behind the wheel of a vehicle owned by the employer which was involved in a vehicular accident." *Chandler*, 2 F.3d at 1395, *citing Collier v. City of Dallas*, No. 86-1010, slip op at 3 (5th Cir., August 19, 1986) (unpublished).

[44] To be codified at 49 C.F.R. §391(b).

[45] See District Court Findings of Fact, No. 55.

[46] See District Court Findings of Fact, No. 56.

The next step of the analysis is to determine whether a reasonable accommodation exists to either eliminate the risk or reduce it to an acceptable level.[47] Chandler and Maddox failed to present any evidence that reasonable accommodation was available that would eliminate the substantial risk inherent in their driving. The Fifth Circuit found this lack of evidence to be fatal, given petitioner's burden of establishing that a reasonable accommodation was possible for the positions they sought.[48] Therefore the district court erred as a matter of law in holding that Chandler and Maddox were otherwise qualified for primary driver positions.

The City did provide evidence that it took all reasonable steps to accommodate Chandler and Maddox without abandoning the legitimate purposes of AD 3-3. Chandler and Maddox testified they were hired and permitted to drive for the City until the Program was implemented for their positions. Afterwards, Chandler and Maddox were permitted to retain their positions even though they were classified as primary driver positions. Supervisors and co-workers drove petitioners when they needed to work at other sites. Finally, when the driving duties of their original positions, and the positions they hoped to promote to lessened, the positions were reclassified as secondary driver positions.[49] The only

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[47] *School Board of Nassau County v. Arline*, 480 U.S. 273, 288 (1987); *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979), 29 C.F.R. §1630.2 (1993).

[48] *Chandler*, 2 F.3d at 1395.

[49] Transcript Vol. 17, pp. 42-43; Vol. 18, p. 25 and Vol. 20, p. 99.

manner in which petitioners were not accommodated was a temporary restriction on their driving and positions to which they could promote. In this case the City went far beyond the mandate of the Act to accommodate the petitioners.

III. CLASS CERTIFICATION

The Fifth Circuit ruled that class certification and class relief were inappropriate as a matter of law in the instant case.[50] This holding was based on the fact that handicap discrimination claims are particularly unsuited to resolution through class determinations, in part because of the individualized fact finding that is necessary just to determine who is in the protected group of workers.

> "The question of who is a handicapped person under the [Rehabilitation] Act is best suited to a 'case-by-case determination,' as courts assess the effects of various impairments upon various individuals. The definitional task cannot be accomplished merely through abstract lists and categories of impairments. The inquiry is, of necessity, an individualized one – whether the particular impairment constitutes for the particular person a significant barrier to employment."[51]

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[50] *Chandler*, 2 F.3d at 1396.

[51] *Forrisi*, 794 F.2d at 933 (citations omitted); *see also Jasany*, 755 F.2d at 1249; *Elstner*, 659 F.2d at 1342.

The uniqueness of each class member's claim negates the Rule 23 prerequisites of typicality, commonality, and representativeness.[52] The district court's across-the-board certification of two subclasses of City employees ignores the individualized treatment that each of their claims deserves. Moreover, plaintiff's class representatives must be part of the class to be certified, and must "possess the same interest and suffer the same injury as the class members."[53] Since there was no finding by the district court that Maddox and Chandler met this test, there should have been no class certification with respect to the two putative subclasses.

This Court has stated that a case-by-case determination is also required in order to determine whether an impairment constitutes a substantial limitation to a major life activity. "Such an inquiry is *essential* if §504 is to achieve its goal of protecting handicapped individuals . . . "[54] The district court failed to make this case-by-case determination; therefore, class certification was improper.

IV. CLEARLY ERRONEOUS STANDARD

Petitioners argue that the court of appeals violated the clearly erroneous rule by reversing the district court's findings of fact. Specifically, petitioners argue that Fed. R. Civ. P. 52(a) precludes a court of appeals from reversing a district court's findings of fact if that court's account of

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[52] *See* Fed. R. Civ. P. 23(a).

[53] *East Texas Motor Freight System v. Rodriguez*, 431 U.S. 395, 403 (1977).

[54] *Arline*, 480 U.S. at 287 (emphasis added).

the evidence is plausible in light of the record and cite two Supreme Court cases to support this proposition.[55]

Petitioners fail to address the fact that the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) does *not apply* to conclusions of law. The Supreme Court recognized that courts of appeals have an obligation to set aside conclusions of law that rest on erroneous views of the law.[56] The Court stated that if a trial court bases its findings upon a mistaken impression of applicable legal principles, the court of appeals is not bound by the clearly erroneous standard.[57]

In the case at hand, the court of appeals held that petitioners were not handicapped and not otherwise qualified *as a matter of law.* The court of appeals was not bound by the clearly erroneous standard when it concluded that the City had not violated the Act or the constitutional rights of the petitioners.

V. DENIAL DUE PROCESS

Chandler claimed he was denied due process in that he was not allowed to present certain evidence with

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[55] *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985), *Pullman-Standard v. Swint,* 456 U.S. 273 (1982).

[56] *United States v. United States Gypsum Co.,* 364, *reh. den.* 333 U.S. 869 (1948); *United States v. E. I. Du Pont de Nemours & Co.,* 353 U.S. 586 (1957); *United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960); *United States v. Singer Mfg. Co.,* 374 U.S. 174 (1963); *United States v. General Motors Corp.,* 384 U.S. 127 (1966); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,* 456 U.S. 844 (1982).

[57] *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,* 456 U.S. 844 (1982).

regards to his demotion.[58] The court of appeals found that the demotion hearing provided to Chandler was "constitutionally adequate."[59] Chandler simply failed to show that his demotion was effected without due process. the district court held in its conclusion of law that Chandler was denied the opportunity to present certain evidence with regard to his demotion.[60] Chandler never claimed or established he was denied a hearing or that the trial board was not an impartial decision maker which is what he would have to establish to prevail on this claim.[61] The mere fact that a tribunal rejects one's line of reasoning does not constitute a denial of one's due process.[62]

VI. CONCLUSION

None of the issues Chandler, Maddox or the Association presents is of precedential value that warrants review by this Court. Additionally, there is no conflict among the circuits regarding any of the issues presented. The Fifth Circuit meticulously reviewed the facts and

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[58] Petitioners do not appeal the Fifth Circuit's finding that the City did not violate their First Amendment or Equal Protection Rights.

[59] *Chandler*, 2 F.3d at 1397.

[60] See District Court Conclusions of Law, No. 27.

[61] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

[62] *Davis v. Sherer*, 468 U.S. 183 (1984); *Arnett v. Kennedy*, 416 U.S. 134 (1974).

applied the correct legal standards in reaching its conclusions. For these reasons stated herein, this Court should deny petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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